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The time period for reply, if any, is set in the attached communication.

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES

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*Ex parte* BRIAN MICHAEL BRIDGEWATER,  
MARTIN JOHN DEETZ,  
RALPH CRAIG EVEN,  
MATTHEW STEWART GEBHARD,  
and CAREN ANN PUSCHAK

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Appeal 2010-008978  
Application 10/700,078  
Technology Center 1700

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Before EDWARD C. KIMLIN, BRADLEY R. GARRIS, and  
CHUNG K. PAK, *Administrative Patent Judges*.

GARRIS, *Administrative Patent Judge*.

DECISION ON APPEAL<sup>1</sup>

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<sup>1</sup> The two-month time period for filing an appeal or commencing a civil action, as recited in 37 C.F.R. § 1.304, or for filing a request for rehearing, as recited in 37 C.F.R. § 41.52, begins to run from the “MAIL DATE” (paper delivery mode) or the “NOTIFICATION DATE” (electronic delivery mode) shown on the PTOL-90A cover letter attached to this decision.

Appellants appeal under 35 U.S.C. § 134 from the Examiner's decision rejecting claims 1-7 and 15-18.<sup>2</sup> We have jurisdiction under 35 U.S.C. § 6.

We AFFIRM.

Appellants claim an aqueous coating composition comprising an aqueous acrylic emulsion polymer comprising, as copolymerized units, monoethylenically unsaturated nonionic (meth)acrylic monomer and monoethylenically unsaturated acid monomer wherein the emulsion polymer is formed by emulsion polymerization in the presence of a thermal initiator and wherein less than half of the initiator is present during the first 10% of the conversion of monomers to the emulsion polymer (claim 2).

Representative claim 2 reads as follows:

2. An aqueous coating composition comprising a pigment and an aqueous acrylic emulsion polymer comprising, as copolymerized units, from 50 to 99.75% by weight, based on dry polymer weight, monoethylenically unsaturated nonionic (meth)acrylic monomer and from 0.25 to 10% by weight, based on dry polymer weight, monoethylenically unsaturated acid monomer, said polymer having a Tg of -10 °C to 35 °C wherein said emulsion polymer is formed by emulsion polymerization at a temperature of from 70 °C to 99 °C in the presence of a thermal initiator, wherein said initiator is used in the amount of 0.05 to 0.3%, by weight, based on dry polymer weight, and wherein less than half of said initiator is present during the first 10%, by weight, based on dry polymer weight, of the conversion of monomers to said emulsion polymer, and a neutralizer, wherein said neutralizer is used in the amount of from 5% to 75%, on an equivalents basis, based on said monoethylenically unsaturated acid monomer, and wherein less than half of said neutralizer is present during the first 25%, by

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<sup>2</sup> We will not entertain Appellants' Request for Reconsideration of the Examiner's restriction requirement (App. Br. 14). Such a request is a matter to be reviewed by petition, not appeal. See the Manual of Patent Examining Procedure (MPEP) § 1201 (Rev. 3, August 2005) and § 1002.02(c) (Rev. 2, May 2004).

weight, based on dry polymer weight, of the conversion of monomers to said emulsion polymer.

The Examiner rejects claims 2-5, 7, and 17 under 35 U.S.C. § 102(b) as being unpatentable over Friel (US Patent 5,731,377, issued March 24, 1998) (Ans. 3-4).

Under 35 U.S.C. § 103(a), the Examiner rejects claim 6 over Friel, rejects claims 1, 3-7, and 16 over Friel in view of Ishikawa (US Patent 4,325,856, issued April 20, 1982), rejects claim 15 over Friel, Ishikawa, and Bricker (US Patent 5,502,089, issued March 26, 1996), and rejects claim 18 over Friel in view of Bricker (*id.* at 4-9).

We will sustain these rejections based on the findings of fact, conclusions of law, and rebuttals to argument expressed by the Examiner in the Answer (*id.* at 3-12). We add the following comments for emphasis.

The only reasonably specific issue raised by Appellants' arguments is whether the product-by-process claims on appeal, as represented by independent claim 2, define an emulsion polymer which is distinguishable from the emulsion polymer disclosed by Friel.

In an attempt to refute the Examiner's finding that the above two emulsion polymers are indistinguishable, Appellants proffer the Even Declaration of December 21, 2007 and the Even Declaration of March 3, 2009 (App. Br. 7-9). In addition to presenting scrub resistance data, the 2009 Even Declaration includes and clarifies the chromatogram data in the 2007 Even Declaration. Accordingly, it is appropriate to discuss the 2009 Declaration only.

Appellants argue that the three chromatograms in Appendix A of the 2009 Even Declaration show that the three tested inventive polymers and

Friel polymers are different because they exhibit different elutions (App. Br., para. bridging 7-8).

However, we agree with the Examiner that two of the three chromatograms militate against Appellants' argument because they show dual elutions for both the inventive and comparison examples (Ans. 9). Indeed, no meaningful difference is shown, and Appellants describe none specifically, by the almost identical elutions of the inventive (AH311) and comparison (AH309) examples in the third chromatogram. Significantly, Appellants' Reply Brief contains no rebuttal to the Examiner's criticism of this chromatogram evidence.

Appellants also argue that the 2009 Even Declaration shows their claimed polymers are different from Friel's polymers by the higher scrub resistance for the AH303 inventive polymer relative to the AH301 comparison polymer (App. Br. para. bridging 8-9).

This argument is unpersuasive. As correctly pointed out by the Examiner in the Answer, and not disputed by Appellants in the Reply Brief, the scrub resistance data in the 2009 Declaration are not consistent because, unlike the above polymers identified by Appellants, the SB171 inventive polymer exhibits a lower scrub resistance than the SB170 comparison polymer (Ans. para. bridging 9-10). Therefore, contrary to Appellants' belief, the inconsistent scrub resistance data of the Declaration does not establish that the claim 2 polymers are necessarily different from the polymers of Friel.

Appellants further argue that their claim 2 polymers, relative to the Friel polymers, are not only novel but unobvious on the grounds that they

exhibit unexpected results as shown, for example, by the scrub resistance data in the 2009 Even Declaration (App. Br. 9-13). We cannot agree.

The evidence proffered by Appellants is not commensurate in scope with claim 2. In this regard, the Examiner correctly explains, and Appellants do not disagree in the Reply Brief, that the exemplified amounts (i.e., 10-35%) of initiator added during the first 10% of monomer conversion are not commensurate in scope with the claim 2 amounts of less than half (Ans. 10-12). We also find merit in the Examiner's point that claim 2 is not limited to the inventive polymers of the 2009 Declaration which are all derived from ureido monomer (*id.*). While we understand Appellants' reason for testing ureido-derived polymers (Reply Br. 2-3), the fact remains that claim 2 encompasses a wide variety of other polymers which might well exhibit expected rather than unexpected results.

Concerning the Examiner's criticism that Appellants' data is not commensurate in scope with claim 2, Appellants argue that no factual basis exists for expecting untested claim 2 compounds to behave differently from the compounds tested in the data (App. Br. 12).

Appellants are incorrect. As indicated above, the Examiner has expressly identified factual bases in the chromatogram data and in the scrub resistance data which reveal that Appellants' inventive polymers do not necessarily and consistently distinguish from Friel's polymers. At best, Appellants' Declaration evidence merely indicates that some inventive polymers appear to be different while other inventive polymers appear to be the same as the polymers of Friel. This circumstance supports the Examiner's finding that claim 2 is anticipated by Friel.

For the reasons set forth above and in the Answer, we sustain the § 102 rejection of claims 2-5, 7, and 17 as being anticipated by Friel. We also sustain the alternative § 103 rejection of these claims over Friel on the grounds that evidence establishing lack of novelty necessarily evinces obviousness. *See In re Fracalossi*, 681 F.2d 792, 794 (CCPA 1982). Finally, we sustain the remaining rejections on appeal for the reasons given above and in the Answer.

The decision of the Examiner is affirmed.

AFFIRMED

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